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Construction Law

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In addition to common issues of construction law, cases from this year's Survey period address novel issues such as the interplay of construction law and constitutional law and mandatory COVID-19 vaccines.¹ As predicted in last year's survey article,² cases covered this year address the continuing effects of the COVID-19 pandemic. Moreover, while construction projects resumed, the industry faced normal problems as well as unprecedented supply-chain difficulties.

I. I KNOW IT WHEN I SEE IT

First Amendment law is one of the more complex aspects of constitutional law. Fortunately, when freedom of expression and architectural design issues are intermingled, the resulting opinion can be downright entertaining. If that were not enough, add in a heaping helping of sarcasm and infighting between appellate panel members, and the case becomes a "must read" in legal circles; both majority opinions and dissents often liberally use renderings and other visual media to advance their arguments.

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1. For an analysis of Construction Law during the prior survey period, see David Cook & Peter Crofton, *Construction Law, Annual Survey of Georgia Law*, 73 MERCER L. REV. 59 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/7/ [<https://perma.cc/P37Q-HNYU>].

2. Cook & Crofton, *Construction Law*, 73 MERCER L. REV. 59.

Such is the case, for example, with the United States Court of Appeals for the Eleventh Circuit's decision in *Burns v. Town of Palm Beach*.³ The facts are relatively straightforward: Donald Burns sought to replace his home with one that was "a reflection of his evolved philosophy of simplicity in lifestyle and living with an emphasis on fewer personal possessions."⁴ In an effort to live in a house intended "to be a means of communication and expression of the person inside," Burns submitted plans to the Town of Palm Beach, proposing

demolishing his existing 10,063 square foot mansion and building in its place a 25,198 square foot mansion in the midcentury modern design. [Burns's] emphasis on fewer personal possessions included two stories and a basement containing a five-car garage, wine storage area, and steam room. The first floor would have an open-air entry [that] would lead to the pool, spa, and cabana.⁵

The town rejected Burns's plans as being inconsistent with the other homes in the immediate vicinity, even after Burns scaled down his plans to a 19,594 square-foot design that included a wall and landscaping that would obscure the view of the home from most vantages.⁶ Not to be deterred, Burns sued the town in federal court alleging the town violated his Fourteenth Amendment rights to due process and equal protection.⁷ The United States District Court for the Southern District of Florida, applying the three-part predominate purpose test laid out in *Mastrovincenzo v. City of New York*,⁸ upheld the town's rejection of Burns's plans after determining that the predominate purpose of the proposed house was "to serve as a residence, not as a piece of visual art."⁹

Burns appealed the district court's decision to the Eleventh Circuit.¹⁰ On appeal, Burns found a majority that did not countenance his views and a sympathetic judge who wrote a dissent that was sharply critical of the majority's reasoning and conclusions.¹¹ The resulting majority opinion is, in turn, chock-full of side comments about the dissenting opinion. For example, the dissent repeatedly referenced other

3. 999 F.3d 1317 (11th Cir. 2021).

4. *Id.* at 1325.

5. *Id.* The dissent questioned the majority's rationale for this description of the proposed home's features: "Perhaps my colleagues intend to suggest that Burns's First Amendment claim is disingenuous." *Id.* at 1376 n.5 (Marcus, J., dissenting).

6. *Id.* at 1326–27.

7. *Id.* at 1328; see U.S. CONST. amend. XIV, § 1.

8. 435 F.3d 78 (2d Cir. 2006).

9. *Burns*, 999 F.3d at 1329.

10. *Id.* at 1330.

11. *Id.* at 1330–31.

architectural structures that had not been raised in the proceeding below, including the Roman Forum, the U.S. Capitol, and Versailles.¹² The majority lambasted the dissent for “escap[ing] the confines of the record to look for evidence that the parties never put forward and the district court never considered.”¹³

The majority and the dissent also vehemently disagreed on the importance of the majority’s affirmance of the lower court’s decision.¹⁴ The majority expressly stated that given the facts concerning Burns’s application, the court need not and was not deciding “the harder issues of whether residential architecture can ever be expressive conduct.”¹⁵ Nevertheless, the dissent argued that the majority’s decision “virtually ensures that no piece of residential architecture will ever garner First Amendment protection.”¹⁶ This prompted the majority to directly rebuke the dissent: “The dissenting opinion is wrong about what we have—and haven’t—decided today. To dispel any lingering confusion, we emphasize again that we are not deciding whether residential architecture can ever be expressive conduct protected by the First Amendment.”¹⁷

The takeaways from this opinion are both narrow and broad. On the specific legal issue of whether residential architecture can be speech protected by the First Amendment, the determination is kicked down the road for decision on different facts. While on the broader issue of how judges decide cases, the lesson appears to be that architecture is like pornography—judges react to the underlying content as much, if not more, than they do to the applicable law.

II. THE PROFESSIONAL STANDARD OF CARE IS NOT A BULLET-PROOF SHIELD

The United States District Court for the Northern District of Georgia determined that actionable professional negligence is not limited to violations of a professional standard of care.¹⁸ In *Fireman’s Fund Insurance Co. v. Carpet Capital Fire Protection, Inc.*,¹⁹ an insurance company paid a claim for fire damage and brought a subrogation action

12. *Id.* at 1332 (discussing the dissent).

13. *Id.*

14. *Id.* at 1331, 1353–54.

15. *Id.* at 1335.

16. *Id.* at 1354 (Marcus, J., dissenting).

17. *Id.* at 1336.

18. *Fireman’s Fund Ins. Co. v. Carpet Cap. Fire Prot., Inc.*, No. 4:21-cv-66-AT, 2022 U.S. Dist. LEXIS 103011 (N.D. Ga. Mar. 24, 2022).

19. 2022 U.S. Dist. LEXIS 103011.

against the party allegedly responsible for the \$11 million in damage.²⁰ That party was the fire protection inspection firm that performed periodic tests and inspections of a fire sprinkler system. The damage was caused by a fire that started in a space with no sprinkler that the inspector neither designed nor alerted the building owner as to its condition.²¹

The insurance company filed suit alleging professional negligence, breach of contract, and negligence per se; the defendant moved to dismiss the complaint.²² The parties both alleged, and the trial court agreed, that the inspection of fire sprinklers was governed by National Fire Protection Association Publication 25 (NFPA 25).²³ The court granted the motion to dismiss the claims of negligence per se and breach of contract;²⁴ however, it denied the motion as to the negligence claim.²⁵

In allowing the negligence claim to proceed, the court explained that a professional's duty is not limited by a professional standard set by an industry group, such as NFPA 25.²⁶ A professional is required to satisfy common law duties such as the duty to perform work in a skilled and diligent manner.²⁷ The case teaches that a professional cannot simply use a professional standard of care as a checklist. Common law duties supplement any applicable standards of care recognized by industry groups.

III. EXPERT TESTIMONY FOR NEGLIGENT CONSTRUCTION

In another subrogation case brought by Fireman's Fund Insurance Company, the Georgia Court of Appeals addressed the admissibility of expert opinion concerning why two air-handling units froze and caused flooding in a hotel.²⁸ In *Fireman's Fund Ins. Co. v. Holder Construction Group*,²⁹ the hotel owner hired Holder to renovate the hotel and install

20. *Id.* at *2.

21. *Id.* at *2–3.

22. *Id.* at *2, *4–5.

23. *Id.* at *5–7.

24. *Id.* at *11, *18. The court agreed that violation of a statutory duty is a basis for a claim for negligence per se. However, the court determined the plaintiff failed to plead that it was within the class of persons the statute was intended to protect and that the harm was the type of harm the statute was intended to prevent. *Id.* at *8–10.

25. *Id.* at *24–25.

26. *Id.* at *21–23.

27. *Id.* at *23.

28. *Fireman's Fund Ins. Co. v. Holder Constr. Grp., LLC*, 362 Ga. App. 367, 368, 868 S.E.2d 485 (2022).

29. 362 Ga. App. 367, 868 S.E.2d 485.

two rooftop air-handling units.³⁰ After installation, outside temperatures dropped and the units failed to enter freeze-protection mode. As a result, water froze inside the units' coils and began to leak inside the hotel. When the hotel's insurer, Fireman's Fund, paid \$1,306,470.86 for the resultant loss, it brought a subrogation action against Holder and its subcontractor.³¹

The parties' experts presented differing views of the cause of the units' failures.³² The defendants filed motions for summary judgment and to exclude testimony of Fireman's Fund's expert. The Cobb State Court agreed and excluded the expert testimony because it found the testimony to be unsupported and contradictory, and because it was an inadmissible legal conclusion. Finally, after excluding the expert's testimony, it granted summary judgment to the defendants. Fireman's Fund appealed the rulings.³³

The court of appeals rendered a mixed ruling.³⁴ It agreed that the trial court erred in excluding much of the testimony of Fireman's Fund's expert.³⁵ Unlike the trial court, the appellate court found some evidence to support the expert's opinion.³⁶ Additionally, even if the trial court found the testimony of the defendants' experts to be more persuasive, it should not have excluded testimony of Fireman's Fund's expert.³⁷ It is the jury's role to weigh the strength of each experts' testimony.³⁸

However, the court of appeals agreed with the trial court in excluding opinions as to "ultimate legal conclusions."³⁹ The expert had opined that the subcontractor committed negligence by locking open the air damper, which was the core question for the jury.⁴⁰ Distinguishing between testimony informing the "ultimate issue of fact" and an "ultimate legal conclusion," the trial court and appellate court agreed that the expert's opinion constituted a legal conclusion.⁴¹ Nevertheless, the trial court erred in excluding all testimony of the expert, and Fireman's Fund put

30. *Id.* at 367–68, 868 S.E.2d at 487.

31. *Id.* at 368, 868 S.E.2d at 487.

32. *Id.* at 369–70, 868 S.E.2d at 488–89.

33. *Id.* at 367, 868 S.E.2d at 486–87.

34. *Id.*

35. *Id.* at 373, 868 S.E.2d at 490.

36. *Id.* at 374, 868 S.E.2d at 491.

37. *Id.* at 372–73, 868 S.E.2d at 490.

38. *Id.* at 373, 868 S.E.2d at 490.

39. *Id.* at 374, 868 S.E.2d at 491.

40. *Id.*

41. *Id.*

forth admissible evidence of the defendants' fault.⁴² Therefore, summary judgment was improper.⁴³

IV. TERMINATION FOR CAUSE, EQUITABLE REMEDIES, AND TORTIOUS INTERFERENCE

Termination of a construction contract can be fraught with perils. But the contractor in *High Tech Rail & Fence, LLC v. Cambridge Swinerton Builder, Inc.*⁴⁴ managed to terminate its subcontractor's work and avoided adverse consequences.⁴⁵ The contractor hired its subcontractor to furnish and install aluminum railings for the Centennial Park Project in Atlanta.⁴⁶ The subcontractor failed to provide materials and complete the work on schedule, and the contractor sent multiple notices to cure. When the subcontractor sent no laborers to the job for three consecutive days, the contractor sent a notice of termination. Additionally, the contractor contacted the subcontractor's aluminum supplier to buy, on its own account, the materials needed to complete the project.⁴⁷

As a result, the subcontractor filed suit for breach of contract, *quantum meruit*, unjust enrichment, and tortious interference with contract.⁴⁸ Arguing it complied with terms of the subcontract in terminating the subcontractor's work, the contractor sought partial summary judgment.⁴⁹ The subcontract contained a standard termination clause that included a waiver of claims arising from wrongful termination, as well as a "work-through provision"—which required the subcontractor to proceed with the work in the event of a dispute.⁵⁰ Because the Gwinnett County Superior Court concluded that the subcontractor presented no excuse for its failure to send laborers to the jobsite, it granted summary judgment, and the subcontractor appealed.⁵¹

The Georgia Court of Appeals appeared to give the subcontractor a win when it held the subcontract's exculpatory clause, which waived the subcontractor's claims based on wrongful termination, was unenforceable.⁵² The clause was not sufficiently prominent because it

42. *Id.* at 369, 868 S.E.2d at 488.

43. *Id.* at 374–75, S.E.2d at 491.

44. 363 Ga. App. 226, 871 S.E.2d 73 (2022).

45. *Id.* at 226–27, 871 S.E.2d at 76.

46. *Id.* at 227, 871 S.E.2d at 76.

47. *Id.* at 227–28, 871 S.E.2d at 76–77.

48. *Id.* at 228, 871 S.E.2d at 77.

49. *Id.* at 228, 231, 871 S.E. 2d at 77–78.

50. *Id.* at 227–28, 871 S.E. 2d at 77.

51. *Id.* at 228–30, 871 S.E. 2d at 77–78.

52. *Id.* at 230, 871 S.E.2d at 78.

was the same font used throughout the contract, and it was not in a separate section.⁵³ But the subcontractor's win was short-lived because the court of appeals found other reasons to uphold the trial court's ruling.⁵⁴

Applying the terms of the subcontract, the court of appeals agreed that the subcontractor presented no evidence to excuse its failure to proceed with the work and send laborers to the jobsite.⁵⁵ Even if the subcontractor disputed the contractor's notices, it was required to continue working.⁵⁶ Additionally, because the parties had a written contract addressing the work, the trial court correctly dismissed the equitable claims of *quantum meruit* and unjust enrichment.⁵⁷ Finally, the court of appeals upheld the dismissal of the tortious interference claim.⁵⁸ Relying on *J. Kinson Cook of Georgia v. Heery/Mitchell*,⁵⁹ the contractor was not a stranger to the business relationship between the subcontractor and its aluminum supplier because the relationship involved acquiring materials for the same project as the subcontract.⁶⁰

V. QUANTUM MERUIT AND THE MILLER ACT

Quantum meruit failed again in the next case, *U.S. ex rel. Dixie Communications Systems v. Travelers Casualty and Surety Co. of America*.⁶¹ The case involved construction and renovation at Fort Gordon.⁶² The prime contractor J&J Maintenance, Inc. hired subcontractor ICON Construction, Inc., which sub-subcontracted with the plaintiff, Dixie Communications. When Dixie Communications was unpaid for its work, it asserted claims against J&J Maintenance, ICON Construction, and the Miller Act surety, Travelers. There was evidence that J&J Maintenance paid ICON Construction for work performed by Dixie Communications under its contract with ICON Construction.⁶³ Unfortunately for Dixie Communications, ICON Construction filed for Chapter 11 bankruptcy, and because Dixie Communications failed to

53. *Id.*

54. *Id.* at 231, 871 S.E.2d at 78.

55. *Id.* at 230, 871 S.E.2d at 78.

56. *Id.* at 228, 871 S.E.2d at 77.

57. *Id.* at 231, 871 S.E.2d at 78.

58. *Id.* at 231–32, 871 S.E.2d at 79.

59. 284 Ga. App. 552, 644 S.E.2d 440 (2007).

60. *High Tech Rail & Fence, LLC*, 363 Ga. App. at 231–32, 871 S.E.2d at 79.

61. No. CV 118-210, 2021 U.S. Dist. LEXIS 161809 (S.D. Ga. Aug. 26, 2021).

62. *Id.* at *1.

63. *Id.* at *1–3.

send a notice to contractor, the United States District Court for the Southern District of Georgia dismissed its Miller Act claim.⁶⁴

With no active claim against ICON Construction or Travelers, Dixie Communications pursued a *quantum meruit* claim against J&J Maintenance.⁶⁵ On a motion for summary judgment, the court addressed the nuances of Georgia's *quantum meruit* law—both the statutory requirements⁶⁶ and their interpretation by the Supreme Court of Georgia⁶⁷—as it interplays with the Miller Act.⁶⁸ As to the Dixie Communications' claim, the court focused on the elements of (1) expectation of payment, and (2) the failure to pay would be unjust.⁶⁹

First, the court considered whether Dixie Communications expected payment from J&J Maintenance, with whom it had no contract, because of the existence of the Miller Act bond held by J&J Maintenance.⁷⁰ Unlike some other states, Georgia will dismiss a *quantum meruit* claim when an express or implied contract exists “for the same thing . . . at the same time between the same parties.”⁷¹ So theoretically, the claim could succeed under Georgia law. But under the facts in the case, the court concluded that Dixie Communications did not expect payment from J&J Maintenance.⁷² Even if Dixie Communications expected payment from the Miller Act bond held by J&J Maintenance, the court found no evidence that it expected payment from J&J Maintenance directly.⁷³

As to the second element—failure to pay would be unjust—the court ruled that requiring J&J Maintenance to pay Dixie Communications would not be equitable.⁷⁴ Because *quantum meruit* is an equitable doctrine, the court considered whether requiring a prime contractor to pay a sub-subcontractor with whom it had not contracted would be equitable.⁷⁵ While other states have addressed the question, Georgia had not.⁷⁶ The parties argued over the focus of the equitable consideration—

64. *Id.*

65. *Id.* at *5. In a prior order, the court dismissed all other claims by Dixie Communications against J&J Maintenance except the *quantum meruit* claim. *Id.* at *3.

66. O.C.G.A. § 9-2-7 (2022).

67. *Dixie*, U.S. Dist. LEXIS 161809 at *5–6 (citing Amend v. 485 Props., 280 Ga. 327, 329–30, 627 S.E.2d 565, 567–68 (2006)).

68. *Dixie*, U.S. Dist. LEXIS 161809 at *7.

69. *Id.* at *6.

70. *Id.* at *6–7.

71. *Id.* at *10.

72. *Id.* at *11.

73. *Id.* at *10–11.

74. *Id.* at *14–15.

75. *Id.* at *14.

76. *Id.* at *9.

whether the claimant who provided value or the defendant who might be required to pay.⁷⁷ Focusing on the latter, the court found that requiring a prime contractor like J&J Maintenance to pay a sub-subcontractor like Dixie Communications would be unfair after it had already paid its direct subcontractor, ICON Construction.⁷⁸ Because Dixie Communications could satisfy neither of the elements at issue, the court granted J&J Maintenance's motion for summary judgment.⁷⁹

The Miller Act was implicated in another case when the claimant sought recovery through multiple causes of action, including *quantum meruit*.⁸⁰ In *United States ex rel. TSI Tri-State Painting, LLC v. Federal Insurance Co.*,⁸¹ the prime contractor, Sauer, Inc., hired a subcontractor, TSI, to repaint a building at the Naval Submarine Base in Kings Bay.⁸² Before hiring TSI, Sauer engaged another subcontractor that performed paint chip laboratory tests. These tests revealed the presence of lead in the existing paint. TSI was unaware of the lead, and Sauer declined to share the other subcontractor's laboratory results to TSI. While the parties negotiated change orders to address the existing lead, a dispute arose concerning compensation due under one of them.⁸³

TSI sued the Miller Act surety, Federal Insurance Company (Federal), in the United States District Court for the Southern District of Georgia, and both parties filed motions for summary judgment.⁸⁴ Federal argued for dismissal of TSI's *quantum meruit* argument because TSI and Sauer executed a contract for the work. When TSI argued that the contract was voidable because Sauer withheld information concerning lead in the existing paint, Federal countered that TSI had affirmed the contract.⁸⁵ However, some evidence indicated that TSI did not discover the alleged

77. *Id.* at *12 (explaining “a general contractor that satisfied its contract with its subcontractor was not unjustly enriched when the plaintiff was not paid under its contract with the subcontractor” because the subcontractor was paid in full defendants have paid for any materials that they received by virtue of the contract between plaintiff and the subcontractor).

78. *Id.* at *14–15.

79. *Id.* at *15.

80. TSI Tri-State Painting, LLC (*In re* TSI Tri-State) v. Fed. Ins. Co., No. CV 216-113, 2022 U.S. Dist. LEXIS 84562 (S.D. Ga. May 10, 2022).

81. 2022 U.S. Dist. LEXIS 84562.

82. *Id.* at *2.

83. *Id.* at *4, *6–7.

84. *Id.* at *12, *15.

85. *Id.* at *11–12, *26. A party who is fraudulently induced into contract has two options: (1) affirm the contract and seek damages for breach, or (2) rescind the contract and recover in tort for fraud and deceit. *Id.* at *26 (citing *Carpenter v. Curtis*, 196 Ga. App. 234, 236, 395 S.E.2d 653, 655 (1990)).

fraud until long after the contract was executed.⁸⁶ Until a party has full knowledge of the fraud, it cannot affirm a fraudulently induced contract.⁸⁷ Thus, a jury needed to find whether and when TSI obtained full knowledge of the lead in the existing paint, so summary judgment was improper.⁸⁸

VI. BE NICE TO GUESTS

A property owner owes duties to its guests, even when the guests are construction workers.⁸⁹ In *Sinyard v. Georgia Power Co.*,⁹⁰ the Georgia Court of Appeals overturned in part Fulton County Superior Court's grant of summary judgment in favor of a project owner.⁹¹ In *Sinyard*, a worker brought suit against multiple companies that owned facilities at which he had worked and alleged that he was exposed to asbestos.⁹²

The trial court granted summary judgment in favor of all the defendants and determined that (1) Georgia Power was a statutory employer protected by the Workers' Compensation Act, and (2) an exception applied to the duty of a property owner to exercise ordinary care to keep the property safe.⁹³ The court of appeals reversed the grant of summary judgment based on the exceptions to a property owner's duty of care as to two of the three defendants.⁹⁴ The court determined there were disputed issues of material fact concerning the workers' knowledge of the dangers of working on the properties, and whether the owners had turned over the premises to independent contractors.⁹⁵

The *Sinyard* case teaches both the wide scope of the statutory employer defense and the care an owner must take to ensure that it does not have the right to, and does not in fact, control the work performed by independent contractors.

VII. WORDS MEAN WHAT I PAY THEM TO MEAN

The division of responsibility between the legislative and executive branches of the United States Government has been addressed in

86. *In re TSI Tri-State*, 2022 U.S. Dist. LEXIS 84562 at *20–21.

87. *Flair Fashions, Inc. v. Sw Cr Eisenhower Drive*, 207 Ga. App. 78, 79, 427 S.E.2d 56, 57 (1993).

88. *In re TSI Tri-State*, 2022 U.S. Dist. LEXIS 84562 at *26-7, *29.

89. *Sinyard v. Ga. Power Co.*, 363 Ga. App. 195, 871 S.E.2d 45 (2022).

90. *Id.*

91. *Id.* at 195, 871 S.E.2d at 49.

92. *Id.* at 195, 871 S.E.2d at 48.

93. *Id.* at 195, 203, 871 S.E.2d at 49, 54.

94. *Id.* at 195, 208, 871 S.E.2d at 49, 57.

95. *Id.* at 195, 871 S.E.2d at 49.

numerous Supreme Court of the United States decisions.⁹⁶ One of the most recent of those decisions is *West Virginia v. Environmental Protection Agency*⁹⁷ in which the court addressed the authority of the Environmental Protection Agency (EPA) to promulgate regulations known as the Clean Power Plan (CPP) to reduce carbon emissions by requiring electric power generators to switch from fossil fuels to renewables such as wind and solar.⁹⁸ In that matter, the majority determined that the Clean Air Act did not authorize the EPA to impose such regulations.⁹⁹

The majority applied the newly coined “major question doctrine” in determining the EPA lacked the authority to issue the CPP.¹⁰⁰ The majority explained its key reasoning as follows:

Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages that change the plot line.” . . . Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there . . . Or, as we put it more recently, we “typically greet” assertions of “extravagant statutory power over the national economy” with “skepticism.”¹⁰¹

The majority cited the fact that Congress had on more than one occasion rejected legislation that would have expressly authorized the EPA to force power companies to switch from fossil fuels to renewable power sources.¹⁰² The majority also cited the projected economic impact of the CPP as costing “billions of dollars in compliance costs”; “eliminat[ing] tens of thousands of jobs across various sectors”; and “reduc[ing] GDP by at least a trillion 2009 dollars by 2040.”¹⁰³

Ultimately, the majority concluded: “[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”¹⁰⁴

96. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

97. 142 S. Ct. 2587.

98. *Id.* at 2599–600.

99. *Id.* at 2615–16.

100. *Id.* at 2600, 2605, 2615–16.

101. *Id.* at 2609 (citing *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

102. *West Virginia*, 142 S. Ct. at 2595–96.

103. *Id.* at 2604.

104. *Id.* at 2616.

The dissent criticized the majority's decision as unnecessary given that the Trump Administration had rescinded the CPP, and that in years since its promulgation, "[m]arket forces alone cause[] the power industry to meet the [CPP's] nationwide emissions target."¹⁰⁵ The dissent also argued the majority's opinion shows its own anti-agency bias: "Today, one of those broader goals [of the majority] makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence."¹⁰⁶

The differing opinions in *West Virginia* foreshadow several things. First, there are likely to be more challenges to agency actions given the executive branch's desire to advance its priorities despite the inability of Congress to advance legislation given its political divide. Second, the more conservative Supreme Court is likely to continue chipping away at the power of the unelected "fourth branch" of the government—administrative agencies. Third, there are likely to be future Supreme Court opinions that define what constitutes a "major question" for purposes of triggering the major question doctrine, despite the concurrence's efforts to provide a "nonexclusive" list of triggering factors.

For the construction industry, the fallout from *West Virginia* is likely to be more uncertainty concerning the enforceability of new regulations. Changes such as redefining the meaning of "waters of the United States" or expanding the Occupational Safety and Health Administration (OSHA) multi-employer doctrine could be challenged under the major question doctrine given the potential economic impact of the regulations.¹⁰⁷

VIII. THE ECONOMIC LOSS RULE REVISITED

Perhaps one of the most curious legal doctrines in contract law, as explained in *Johnson v. 3M*,¹⁰⁸ "the economic loss rule" is a judicially-created doctrine intended to prevent tort negligence law from displacing the remedies agreed to by parties to a contract.¹⁰⁹

In *Johnson*, a customer of a down-river water utility company filed a class-action lawsuit against several up-river entities for polluting the Upper Coosa River Basin with per-and polyfluoroalkyl substances

105. *Id.* at 2627–28 (Kagan, J., dissenting).

106. *Id.* at 2641 (Kagan, J., dissenting).

107. The Clean Water Act, 33 U.S.C. § 1362; see *Sacket v. EPA*, 8 F.4th 1075 (9th Cir. 2021); *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA*, 142 S.Ct. 661 (2022).

108. 563 F. Supp. 3d 1253 (N.D. Ga. 2021).

109. *Id.* at 1303.

(PFAS), also known as “forever chemicals.”¹¹⁰ The defendants moved to dismiss the complaint, or portions of it, alleging a variety of legal deficiencies.¹¹¹ In a lengthy decision, the United States District Court for the Northern District of Georgia granted in part and denied in part the various motions to dismiss.¹¹²

Much of the decision focused on issues relating to the Clean Water Act and various other legal aspects of environmental law.¹¹³ However, all defendants raised the economic loss rule as a defense to the plaintiffs’ state law claims, alleging the plaintiffs’ damages were “paying a surcharge to filter and remove PFAS from his water supply” and therefore purely economic damages.¹¹⁴ The plaintiffs responded that the economic loss rule was inapplicable because both the alleged property damage and the presence of the PFAS “presented an unreasonable personal health risk,’ and . . . the cost of removing . . . [the hazardous product] was not barred by the economic loss rule.”¹¹⁵

The court also determined that the economic loss rule was inapplicable to some of the defendants because they owed statutory and common law duties of care to the defendants.¹¹⁶ The court explained that the Clean Water Act and the Georgia Water Quality Control Act impose statutory duties of care, while the common law imposes a duty to “exercise reasonable care in their use and disposal of unreasonably dangerous chemicals such as PFAS.”¹¹⁷

The *Johnson* case is instructive in understanding the limits of the economic loss rule. The court’s lengthy analysis of the plead facts and applicable law provides a fulsome discourse on the scope of Georgia’s economic loss rule.

IX. DELAYED LIQUIDATED DAMAGES

A liquidated damages clause is not rendered unenforceable because the owner waits four years after the delay began to seek to recover the damages.¹¹⁸ In *Holiday Hospitality Franchising, LLC v. Northern*

110. *Id.* at 1272–73.

111. *Id.* at 1268.

112. *Id.* at 1358.

113. *Id.* at 1357.

114. *Id.* at 1302.

115. *Id.* at 1309.

116. *Id.* at 1310–11, 1324.

117. *Id.* at 1324.

118. *Holiday Hosp. Franchising, LLC v. N. Riverfront Marina and Hotel, LLLP*, No. 1:21-CV-2584-TWT, 2021 U.S. Dist. LEXIS 161383 (N.D. Ga. Aug. 26, 2021).

Riverfront Marina & Hotel, LLLP,¹¹⁹ a hotel owner agreed to ensure the opening of a hotel in February 2014.¹²⁰ The hotel operator had the right to terminate the agreement for default and recover liquidated damages if the owner failed to meet the deadline. After several extensions of the ready-to-open date, the operator declared the owner in default in April 2019 and terminated the agreement in May or July 2019. The operator filed suit in 2019 seeking to recover the contractual liquidated damages. The owner never started construction of the hotel.¹²¹

The owner moved to dismiss the complaint on two grounds.¹²² The first ground was that the plaintiff waived the right to recover liquidated damages:

[B]y extending the construction milestones for over 7 years, by sitting on its termination rights for nearly 2 years after the last agreed-upon [start of construction] milestone came and went, and by failing to calculate and make any demand for payment of liquidated damages for yet another almost 2 years following termination.¹²³

The United States District Court for the Northern District of Georgia declined to grant summary judgment because waiver is a factual issue for the jury.¹²⁴

The owner also sought to dismiss the complaint alleging the liquidated damages provision was unenforceable.¹²⁵ The court denied the motion to dismiss, calling it premature:

Determining whether a liquidated damages provision is enforceable is a question of law for the court, which necessarily requires the resolution of questions of fact. The required factual inquiry must pertain to the three elements of enforceability [T]he ruling sought by the [owner] here appears premature At the motion-to-dismiss stage, the Court will not reject well-pleaded facts and plain contractual language indicating the elements have been satisfied.¹²⁶

119. 2021 U.S. Dist. LEXIS 161383.

120. *Id.* at *2.

121. *Id.* at *2–3.

122. *Id.* at *5.

123. *Id.* at *8.

124. *Id.* at *9.

125. *Id.*

126. *Id.* at *10–11 (quoting *Nat'l Svc. Indus., Inc. v. Here to Serve Rests., Inc.*, 304 Ga. App. 98, 100, 695 S.E.2d 669, 672 (2010)).

X. EXCLUSIVE MEANS EXCLUSIVE

Liquidated damages for delayed completion are common in construction contracts, although not all liquidated damages provisions expressly say the damages are the exclusive remedy for delay.¹²⁷ In *DonRob Investments L.P. v. 360 Residential, LLC*,¹²⁸ the Georgia Court of Appeals affirmed a decision enforcing a liquidated damages provision in a land-sale agreement.¹²⁹ However, the court overturned the award of other damages, including attorney's fees.¹³⁰

In *DonRob*, the land-sale agreement set forth the "sole and exclusive remedies" in the event of breach by the seller.¹³¹ The specified remedies were in the alternative: (1) terminate the agreement and recoup the funds placed in escrow, or (2) maintain an action for specific performance of the agreement.¹³² However, the Gwinnett County Superior Court awarded the buyer specific performance and monetary damages, including attorney's fees.¹³³

The court of appeals affirmed the award of specific performance while overturning the award of additional damages.¹³⁴ The court explained that because the land-sale agreement expressly waived claims by both parties for attorney's fees, that waiver controlled over the "general rule" allowing a litigant to recover incidental damages, including attorney's fees, along with an order of specific performance.¹³⁵

XI. NO SECOND BITE AT THE APPLE

Settlement agreements for defective work can potentially open a general contractor up to liability down the road.¹³⁶ *Sauer Incorporated v. McLendon Enterprises, Inc.*¹³⁷ illustrates how a contractor can get stuck with a subcontractor's defective work.¹³⁸

127. *DonRob Invs., L.P. v. 360 Residential, LLC*, 363 Ga. App. 312, 870 S.E.2d 874 (2022).

128. 363 Ga. App. 312.

129. *Id.* at 312, 870 S.E.2d at 876.

130. *Id.* at 324–25, 870 S.E.2d at 883–84.

131. *Id.* at 315, 870 S.E.2d at 877–78.

132. *Id.* at 315, 870 S.E.2d at 877.

133. *Id.* at 325, 870 S.E.2d at 883–84.

134. *Id.* at 312, 870 S.E.2d at 876.

135. *Id.* at 324, 870 S.E.2d at 883.

136. *Sauer Inc. v. McLendon Enter., Inc.*, No. CV420-157, 2021 U.S. Dist. LEXIS 165009 (S.D. Ga. Aug. 31, 2021).

137. 2021 U.S. Dist. LEXIS 165009.

138. *Id.*

Sauer involved a construction project for the United States Army Corps of Engineers (USACE).¹³⁹ The plaintiff, the general contractor, contracted with the subcontractor to perform most of the civil site work including the subgrade preparation and installation of the sidewalks. After the completion of the sidewalks, the plaintiff was informed by the USACE of issues with the sidewalks heaving. The inspections determined that the sidewalk was less than the required four-inch thickness at various locations, and the geotextile fabric used may not have been permeable enough, causing water to pool under the sidewalk.¹⁴⁰ The plaintiff filed suit in 2017 alleging the subcontractor breached the subcontract by failure to properly perform its scope of work.¹⁴¹

The parties settled for \$46,500 in consideration for the release of the plaintiff's claims.¹⁴² The settlement agreement stated that the parties would release "any and all claims, actions, [and] causes of action."¹⁴³ Two years later, USACE notified the plaintiff of additional problems with the sidewalks. The issues were caused by the defective installation of the subgrade.¹⁴⁴ The plaintiff initiated a lawsuit in 2019 alleging that the defendant breached the terms of the subcontract "by failing to properly perform its scope of work at the Project, causing defects such as curling, expansion and heaving of the sidewalks in certain areas."¹⁴⁵ The defendant moved for summary judgment based on *res judicata* and the settlement agreement barring the plaintiff's claim.¹⁴⁶

The court granted summary judgment barring the plaintiff from recovering damages it incurred when remediating the defendant's defective work.¹⁴⁷ The court found that the suit was barred by both *res judicata* and the settlement agreement.¹⁴⁸ The only element at issue for *res judicata* was the "identity of the cause of action."¹⁴⁹ In determining whether this claim was a separate cause of action, the court looked to whether both claims arose from the same set of facts.¹⁵⁰ The court stated that "[i]n both cases Plaintiff is alleging that Defendant failed to properly

139. *Id.* at *1.

140. *Id.* at *1, *4–5.

141. *Id.* at *7–8.

142. *Id.* at *8.

143. *Id.* at *9.

144. *Id.* at *9–10.

145. *Id.* at *7–8.

146. *Id.* at *12–13.

147. *Id.* at *10–11.

148. *Id.* at *13.

149. *Id.* at *14–15.

150. *Id.* at *15.

perform its obligations under the Subcontract with respect to the [same] Project.”¹⁵¹ The court concluded that the claims arose from the same set of facts, and the second claim was barred.¹⁵²

The court went on to address whether the settlement agreement would also bar the claim.¹⁵³ The language of the settlement agreement had clear, unambiguous language that released the parties from “any and all claims” and also “from any claims raised or that could have been raised in the [first suit].”¹⁵⁴ The court also pointed out that the plaintiff was aware that there were issues all over the site with the sidewalks and still chose to enter into the settlement agreement, and even if the plaintiff was unaware of site-wide defects, Georgia courts interpret “any and all claims” to include “unknown conduct.”¹⁵⁵

Parties involved in construction defect settlements should be sure to include language that expressly states who will take on the risk of continued, latent defects.¹⁵⁶

XII. BUT LOOK, THEY HAVE MONEY!

During discovery, parties are generally not afforded the luxury of perusing the other’s financial status unless there is evidence that information will be institutional to proving a claim.¹⁵⁷ In *FP Augusta II, LLC v. Core Construction Services, LLC*,¹⁵⁸ the parties were claiming and counterclaiming breach of a contract in connection with the renovation of housing facilities in Augusta, Georgia.¹⁵⁹ The plaintiffs claimed that Core Construction’s “work on the project was deficient, delayed, and incomplete,” while Core claimed that the plaintiffs had stripped the project architect of authority causing delays in the owner’s direction of the project.¹⁶⁰

Throughout one of the depositions, Core Construction inquired into the financial status of the plaintiffs.¹⁶¹ The plaintiffs sought a protective order to preclude any further inquiry into their finances arguing the

151. *Id.* at *16.

152. *Id.* at *21–22.

153. *Id.* at *22–24.

154. *Id.* at *9.

155. *Id.* at *24–25.

156. *Id.*

157. *FP Augusta II, LLC v. Core Constr. Servs, LLC*, No. CV 119-048, 2021 U.S. Dist. LEXIS 227314 (S.D. Ga. June 4, 2021).

158. 2021 U.S. Dist. LEXIS 227314.

159. *Id.* at *1–2.

160. *Id.*

161. *Id.* at *2.

information was not related to the claims at hand.¹⁶² The United States District Court for the Southern District of Georgia granted the motion for protective order and stated that succumbing to Core Construction's argument that the financial status is relevant to defective work and delay claims would undermine the precedent set forth in *Orr v. Macy's Retail Holdings, Inc.*¹⁶³ To get a look at the opposition's bank account, the court requires that the parties have more than just an underlying interest in money, but a relevant basis to the claim.¹⁶⁴ Anything less than a relevant basis to the claim would allow parties to openly inquire into the financial status of the other as the ultimate interest in almost all suits is money in the form of damages.¹⁶⁵

XIII. AMBIGUITY FALLS IN FAVOR OF MORE COVERAGE

*Endurance American Specialty Insurance Co. v. L. Pellinen Construction, Inc.*¹⁶⁶ illustrates the importance of clear, defined terms and the importance of sufficient risk allocation by indemnification.¹⁶⁷ Esdras Ambrocio was working for a subcontractor of Pellinen Construction, building a home, when a roof truss failed and Ambrocio fell twenty feet to the concrete slab below. The subcontractor's workers' compensation carrier filed suit against Pellinen and the entities that owned and developed the neighborhood in which the house was built.¹⁶⁸

Pellinen had a general liability policy that required Endurance, the carrier of the general liability insurance, to defend and indemnify Pellinen.¹⁶⁹ The policy extended this coverage to "additional insureds" for whom Pellinen was performing work.¹⁷⁰ The developer and property owners asserted that Endurance should defend the claims against them as they were additional insureds. Endurance refused to defend them claiming that three policy exclusions applied, including a Workers' Compensation exclusion, an "Employer's Liability" exclusion, and a "Multi-Unit Construction Project" exclusion.¹⁷¹ Both parties filed motions for summary judgment, and the United States District Court for the

162. *Id.* at *1.

163. *Id.* at *3-4 (citing *Orr v. Macy's Retail Holdings, Inc.*, No. CV 416-052, 2016 U.S. Dist. LEXIS 147573, at 7 (S.D. Ga. Oct. 24, 2016)).

164. *FP Augusta*, 2021 U.S. Dist. LEXIS 227314 at *3-4.

165. *Id.*

166. No. 21-10256, 2021 U.S. App. LEXIS 33587 (11th Cir. Nov. 12, 2021).

167. *Id.*

168. *Id.* at *2.

169. *Id.* at *2-3.

170. *Id.* at *3.

171. *Id.*

Middle District of Florida granted summary judgment in favor of the property owner and developer, forcing Endurance to indemnify and defend them in the personal injury claim.¹⁷²

The United States Court of Appeals for the Eleventh Circuit mainly focused its analysis on the policy's Workers' Compensation and Employer's Liability exclusions.¹⁷³ First, the Workers' Compensation exclusion prohibited coverage of "[a]ny obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law."¹⁷⁴ Second, the Employer's Liability exclusion excluded coverage for injury sustained in the course of employment.¹⁷⁵ The only way that Endurance could succeed on these arguments is to show that Ambrocio was working as a "statutory employee" of the owner and developer of the property.¹⁷⁶ The court relied on Endurance's complaint that identifies the defendants as "owner/developer" and enforced the idea that a property owner does not take on the role of a "contractor" as defined by the Florida Workers' Compensation Act, and therefore the arguments failed.¹⁷⁷

The last argument that Endurance made was that there was still an exclusion under the "Multi-Unit Construction Project" provision in the policy.¹⁷⁸ This excluded injury that is sustained in connection with the original construction of a "Multi-Unit Construction Project," which is defined as "any . . . 'housing development' where the completed project will exceed 10 'residential units.'"¹⁷⁹ The policy defines "housing development" as "a 'series of separate dwellings being constructed on a single contiguous parcel of land.'"¹⁸⁰ The evidence showed that the land was purchased and then split into separate parcels.¹⁸¹ The court held that under Florida law, when two reasonable interpretations of an undefined policy term exist, it must be resolved in favor of providing coverage, not limiting it.¹⁸² Here, the ambiguity revolved around what a "single contiguous parcel of land" includes.¹⁸³ Endurance argued that the land was still a contiguous parcel that was developed to be one

172. *Id.* at *3–4.

173. *Id.* at *10.

174. *Id.* at *10–11.

175. *Id.* at *11.

176. *Id.* at *12.

177. *Id.* at *13–14 .

178. *Id.* at *15–16.

179. *Id.* at *16.

180. *Id.*

181. *Id.* at *16–17.

182. *Id.* at *18.

183. *Id.* at *17–18.

neighborhood.¹⁸⁴ However, because the term was undefined and ambiguous, the court erred on the side of more coverage and granted a declaration that Endurance would indemnify the owner and developer against the workers' compensation carrier.¹⁸⁵

XIV. ARBITRATION AWARDS ARE SET IN STONE

Challenging an arbitration result in court is not an easy road.¹⁸⁶ In *Magnum Contracting, LLC v. Century Communities of Georgia, LLC*,¹⁸⁷ the Georgia Court of Appeals reinforced the importance of the finality of arbitration awards.¹⁸⁸ An arbitration award can only be vacated under extremely limited circumstances.¹⁸⁹ The limited reasons to vacate an arbitration award are:

- (1) Corruption, fraud, or misconduct in procuring the award;
- (2) Partiality of an arbitrator appointed as a neutral;
- (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made;
- (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or
- (5) The arbitrator's manifest disregard of the law.¹⁹⁰

In *Magnum*, the only two grounds at issue were imperfect execution and manifest disregard of the law.¹⁹¹ Both of these grounds are high bars, and there was not enough evidence to prevail on either ground.¹⁹²

The controversy between the parties was an issue of indemnity found in the subcontract and who would bear the cost of litigation.¹⁹³ After concluding that the subcontract's indemnity provision applied only to the extent the subcontractor was negligent, the arbitration panel determined

184. *Id.*

185. *Id.* at *18–19.

186. *See* *Magnum Contracting, LLC v. Century Cmtys. of Ga., LLC*, 362 Ga. App. 755, 870 S.E.2d 75 (2022).

187. 362 Ga. App. 755.

188. *Id.*

189. *Id.* at 759, 870 S.E.2d at 79 (citing *Adventure Motorsports Reinsurance, Ltd. v. Interstate Nat'l Dealer Servs.*, 313 Ga. 19, 25, 867 S.E.2d 115, 121 (2021)).

190. *Magnum*, 362 Ga. App. at 759, 870 S.E.2d at 79–80 (quoting O.C.G.A. § 9-9-13(b) (2003)).

191. *Magnum*, 362 Ga. App. at 760, 870 S.E.2d at 80.

192. *Id.* at 763, 870 S.E.2d at 82.

193. *Id.* at 757–58, 870 S.E.2d at 79.

that the subcontractor was not required to indemnify the contractor or pay the contractor's cost of litigation.¹⁹⁴

On a petition to vacate the arbitration award, the Fulton County Superior Court agreed with the contractor and vacated the award.¹⁹⁵ In the court of appeals, the court agreed that the arbitration award could not have been issued by a court of law or equity.¹⁹⁶ The panel even may have misinterpreted the indemnification clause, “[b]ut that is not reason enough to vacate it.”¹⁹⁷ An arbitrator is “free to award on the basis of broad principles of fairness and equity.”¹⁹⁸ Moreover, even if the panel misunderstood the law or misinterpreted the indemnification clause, the contractor presented no evidence that the panel intentionally disregarded the law.¹⁹⁹

Magnum shows the strong preference for parties to address disputes by alternative dispute resolution. Thus, the courts impose a very high bar to vacate arbitration awards, even when they produce results not available or acceptable in a court of law or equity.

XV. YOU CANNOT BRIEF YOUR WAY OUT OF THIS

Continental Properties Group, Inc. (Continental) developed apartment complexes across the country.²⁰⁰ For some of its developments, Continental hired Albertelli Construction, Inc. Over time, Eguizabal, Vice President at Continental, allegedly began receiving bribes in return for awarding contracts to Albertelli Construction. After discovery of defective work, Continental stopped awarding contracts to Albertelli Construction.²⁰¹

David Albertelli, principal of Albertelli Construction, then partnered with Gregory Hilz to form Westcore and begin receiving contracts from Continental.²⁰² Under the direction of Albertelli, Hilz made misrepresentations about how long the company had been around and the amount of revenue he expected to bring in, all while keeping Albertelli out of the public eye of owning Westcore. At Continental's

194. *Id.* at 758, 870 S.E.2d at 79.

195. *Id.*

196. *Id.* at 763, 870 S.E.2d at 82.

197. *Id.*

198. *Id.* at 762, 870 S.E.2d at 82 (citing *A&M Hosps., LLC v. Alimchandani*, 359 Ga. App. 271, 278, 856 S.E.2d 704, 710 (2021)).

199. *Magnum*, 362 Ga. App. at 762, 870 S.E.2d at 81.

200. *Cont'l 332 Fund, LLC v. Albertelli*, No. 20-13133, 2021 U.S. App. LEXIS 22346, *2 (11th Cir. July 28, 2021).

201. *Id.* at *2-3.

202. *Id.*

request, Westcore sent a qualification statement that laid out the experience of the company and past projects, including one in Denver, Colorado. A year after this representation, Continental inquired further into the details of the Denver project. Under the direction of Albertelli again, Hilz sent over a fabricated story and photos of apartments they found on the internet. This satisfied Continental's inquiry, but Westcore began to have issues internally that ended with Hilz tipping off a Continental employee to the alleged fraud.²⁰³

Continental filed suit against Hilz alleging fraud, conspiracy to commit fraud, and a RICO violation.²⁰⁴ Hilz moved for summary judgment, which was granted.²⁰⁵ On appeal, the United States Court of Appeals for the Eleventh Circuit considered "whether (1) [Continental] ha[s] established that Hilz committed two predicate acts of racketeering, (2) [Continental] may rely on RICO's conspiracy provision and thus bypass the predicate-act requirement, and (3) [whether] the district court erred in denying [Continental's] motion for reconsideration."²⁰⁶

First, the court looked at the complaint and established that Continental alleged three predicate acts, none of which included an email regarding the Denver project.²⁰⁷ Not only that, but the first predicate act alleged was bribery, not fraud.²⁰⁸ Continental attempted to argue their way to an amended complaint to encompass the email, but the court clarified that the way to amend a complaint is not through briefs but Federal Rule of Civil Procedure 15.²⁰⁹ Continental also alleged that the LinkedIn page constituted a predicate act.²¹⁰ The LinkedIn misrepresentations did not rise to a duty to disclose as it was just a passive page and not a representation to Continental from Hilz.²¹¹ The qualification statement did, in fact, qualify as a predicate act.²¹² Therefore, there was only one instance of wire fraud and, without amending their complaint, Continental failed to show two predicate acts required for a RICO violation.²¹³

203. *Id.* at *3–5.

204. *Id.* at *5.

205. *Id.*

206. *Id.* at *6–7 (first through third and fifth alteration in original).

207. *Id.* at *8–9.

208. *Id.* at *10.

209. *Id.* at *15.

210. *Id.* at *11.

211. *Id.* at *11–12.

212. *Id.*

213. *Id.* at *12.

Alternatively, Continental alleged that Hilz was guilty of RICO conspiracy.²¹⁴ The complaint, again, took Continental's argument out from underneath them.²¹⁵ The RICO count did not suggest conspiracy, and Continental failed to incorporate the paragraph that did allege conspiracy from its state court complaint.²¹⁶ Ultimately, the complaint did not allege RICO conspiracy, and Continental, again, attempted to amend its complaint through its brief to fit the new argument.²¹⁷

Ultimately, Continental's arguments failed for a lack of alignment between its argument, the facts, and the allegations made in the complaint.²¹⁸

XVI. EXECUTIVE ORDER 14042: BALANCING HARM

Among many other states, the State of Georgia filed suit seeking an injunction against enforcement of Executive Order 14042 (EO 14042)²¹⁹ to stop the mandatory vaccination of employees of contractors and subcontractors that perform work on federal contracts.²²⁰ The intent of EO 14042, as stated by President Biden, was to promote economic efficiency in the face of the dangers of COVID-19; the idea being that if workers are adequately safeguarded against COVID-19, then there will be less worker absence. Universities from across Georgia presented their concerns at a hearing on December 3, 2021. The representatives of the universities shared concerns and data showing the burden of complying with the COVID-19 requirements already in place, the new burden of verifying and monitoring the vaccination status of an enormous number of employees, and the fact that some of the employees inevitably would refuse to comply. The plaintiffs challenged the President's authority to issue EO 14042.²²¹

A preliminary injunction requires the showing of: "(1) a substantial likelihood of ultimate success on the merits; (2) an injunction or protective order is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the injunction would inflict on the non-movant; and (4) the injunction or protective order would not be

214. *Id.* at *14.

215. *Id.*

216. *Id.* at *14, *17.

217. *Id.* at *17.

218. *Id.* at *19.

219. Exec. Order No. 14042, 86 Fed. Reg. 50985 (Sept. 14, 2021).

220. *Georgia v. Biden*, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, *2 (S.D. Ga. Dec. 7, 2021).

221. *Id.* at *11–14.

adverse to the public interest.”²²² The United States District Court for the Southern District of Georgia focused on the first element.²²³

The President relied completely on the authority provided by the Federal Property and Administrative Services Act (Procurement Act) to authorize EO 14042.²²⁴ The Procurement Act, as interpreted in *The American Federation of Labor and Congress of Industrial Organizations v. Kahn*,²²⁵ gives the President the authority over administrative and broad issues in promoting economic efficiency in federal contracting.²²⁶ So, while the Procurement Act bestows some power upon the President, this power is limited in some respects.²²⁷

The court further stated that EO 14042 went far beyond administrative and management of the procurement of government contracts and intruded into the ability of some contractors to perform federal work in its entirety.²²⁸ The exercise of such power would be authorized only if Congress clearly authorized it.²²⁹ The court determined that the plaintiffs would have a likelihood of success in showing that EO 14042 is far more intrusive than the intent of the Procurement Act, and the language that Congress used did not clearly authorize the President’s actions in EO 14042.²³⁰

The second requirement for an injunction is irreparable injury.²³¹ The court found that the costs that the contractors and subcontractors bear to stay in compliance with these safeguards were irreparable compliance costs.²³² The court went on to balance the harm of granting an injunction and the effect of thousands of individuals not getting the vaccination.²³³ The court chose to keep the status quo by granting the injunction and preventing the harm that would come with the contractors having to dramatically alter their operations to continue to work under the federal contracts and the harm that may ensue on the individual workers that refuse to get the vaccination.²³⁴ The court opined about the effect of some

222. *Id.* at *25 (citing *In re Schindler v. Schiavo*, 403 F.3d 1223, 1225–26 (11th Cir. 2005)).

223. *Id.* at *25–26.

224. *Id.* at *26.

225. 618 F.2d 784 (D.C. Cir. 1979).

226. *Biden*, U.S. Dist. LEXIS 234032 at *26–27.

227. *Id.* at *27–28.

228. *Id.* at *27–29.

229. *Id.* at *28.

230. *Id.* at *29–30.

231. *Id.* at *34.

232. *Id.* at *35–36.

233. *Id.* at *36–37.

234. *Id.* at *36–37, *39.

employees having to be moved to a completely new area of a company if they were not vaccinated and how deeply EO 14042 could affect individuals' lives.²³⁵ Last, addressing the fourth element, the court concluded that due to the same reasons above, the uncertainty and burden caused to employers and employees, the public interest would favor the injunction.²³⁶

235. *Id.* at *37.

236. *Id.* at *37–38.